IN THE

Supreme Court of the United States

October Term, 1952
No. 404

WARNER D. ORVIS, HOMER W. ORVIS, FLOYD Y. KEELER, F. HOWARD SMITH, HAROLD A. ROUSSELOT, HENRY H. BALFOUR, J. ANTONIO ZALDUONDO, WILLIAM G. WIGTON, CLIFFORD J. DOERLE and HEBBERT R. JOHNSON, doing business under the firm name and style of ORVIS BROTHERS & Co. and JOHN J. McCLOSKEY, JR., as City Sheriff of the City of New York,

Petitioners,

against

JAMES P. McGRANERY, Attorney General of the United States, as Successor to the Alien Property Custodian,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONERS' BRIEF

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Opinions Below

The decision of the District Court (R. 45) is unreported. The opinion of the Court of Appeals (R.49-52) is reported at 198 Fed. (2nd) 708.

Jurisdiction

The judgment of the Court of Appeals (R.53) was filed on June 30, 1952. A petition for rehearing, filed on July 14, 1952 (R. 54) was denied on July 23, 1952 (R. 54). A petition for certiorari was filed on October 21, 1952 and certiorari was granted on December 15, 1952. The jurisdiction of this Court rests on 28 U. S. C. 1254(1).

Questions Presented

The Court of Appeals has held that under Section 34 of the Trading with the Enemy Act, as implemented by Treasury Ruling No. 12, the Custodian may disregard an unlicensed attachment lien and refuse it a priority in the distribution of assets subsequently vested by a res vesting order. The questions presented are:

1. Whether an unlicensed attachment on enemy owned assets, valid under New York law, creates an interest, right or title sufficient to support an action by the attachment creditor and the Sheriff under Section 9(a) of the Trading with the Enemy Act?

2. Whether the Custodian is empowered by Section 34 of the Trading with the Enemy Act to refuse recognition to an unlicensed attachment lien and treat an attachment creditor, for purposes of distribution of vested attached assets, on the same basis as a general creditor?

Statutes and Regulations Involved

The pertinent portions of the Trading with the Enemy Act (50 U. S. C. App., Sections 5(b), 9(a) and 34), Executive Order No. 8389 (5 F. R. 1400) as amended by Executive Order No. 8785 (6 F. R. 2897), and General Ruling No.

12, issued April 21, 1942 by the Treasury Department (7 F. R. 2991) are set forth in the Appendix, *infra*, pages 24, *et seq.*

Specification of Errors

The Court of Appeals erred:

1. In refusing to apply the underlying premise of the two Zittman decisions * that an attachment lien upon blocked property is valid though secured without first having obtained a Treasury license.

2. In holding that Congress had the power to and did authorize the denial of priority to "unlicensed" attachment liens, valid under State law and secured prior to a vesting order, in the distribution of the vested attached assets by the Custodian.

3. In construing Section 34 of the Act as indicating the intention of Congress to deprive "unlicensed" attachment liens of priority in the distribution of the vested attached assets by the Custodian.

4. In holding that Treasury Ruling No. 12 prohibits the acquisition of a valid attachment lien in the absence of a Treasury license.

5. In sustaining the validity of the licensing power granted to the Custodian by Section 5(b) of the Act, as implemented by General Ruling No. 12, in the absence of guiding criteria for the exercise of such power.

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* *Zittman* v. *McGrath*, 341 U. S. 446 and *Zittman* v. *McGrath*, 341 U. S. 471, are referred to herein respectively as Zittman No. 1 and Zittman No. 2.

Statement *

This is a suit under Section 9(a) of the Act based upon a lien secured by petitioners through an attachment issued by the Supreme Court of the State of New York on a debt owed by the attachment debtor to Japanese nationals. The suit was brought after the Custodian refused to issue petitioners a license permitting the attachment debtor to pay the amount of the lien to the Sheriff of the City of New York.

The facts, which are not in dispute, are as follows:

Petitioners (except the Sheriff) are New York security and commodity brokers and United States citizens (R. 22). In 1934 they opened a margin account in favor of T. Itoh; the account was guaranteed by C. Itoh & Co. Ltd. which was succeeded by Sanko Kabusiki Kaisya (herein referred to as Sanko) (R. 22). All three were Japanese nationals (R. 22-23). The account was closed out in March 1938 when the customer was indebted to petitioners in the amount of $43,341.37 (R. 23). On November 8, 1941, the indebtedness was assumed by Sanko (R. 23). At the outbreak of the war, the indebtedness had been reduced to $19,796.85 (R. 23).

On June 14, 1941, Executive Order 8389 became effective as to Japan (App. p. 32, *infra*).** Among the assets blocked by Executive Order 8389 was a debt owed Sanko, petitioners' debtor, by Anderson Clayton & Co., an Ameri-

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* The Office of Alien Property and the Alien Property Custodian will be referred to in this brief as the Custodian. The Trading with the Enemy Act will be referred to as the Act.

** The Executive Order prohibited certain transactions, including (Section 1E) "All transfers, withdrawals, or exportations of, or dealings in, any evidences of indebtedness or evidences of ownership of property by any person within the United States;"

can corporation (R. 24). That debt was not vested by the Custodian until June 27, 1947.*

On June 28, 1943, petitioners attached the Anderson Clayton debt to Sanko pursuant to a warrant of attachment issued by the Supreme Court of the State of New York (R. 24). In that suit, judgment was entered in favor of petitioners in October, 1946 and amended in February, 1948, to increase the amount recoverable because of the discovery of the additional amount of indebtedness resulting from the voluntary turn-over by Anderson Clayton & Co. to the Custodian in July, 1947. The judgment, as amended, was in the sum of $29,633.24 (R. 25-26).

On November 20, 1946 petitioners applied to the Treasury Department for a license to permit Anderson Clayton & Co. to pay the funds then in its possession to the Sheriff (R. 14). This application was denied on February 15, 1947 because the Custodian refused to consent (R. 14).

Petitioners then filed a notice of claim under Section 9(a) of the Act. On February 15, 1949, the claim was dismissed by the Hearing Examiner, who treated it as an application for a retroactive license (R. 16). His action was sustained upon appeal by the Director of the Office of Alien Property (R.17).

On April 28, 1949, petitioners brought the present suit under Section 9(a) of the Act seeking a decree declaring that they have a lien upon the vested property, that respondent holds the property subject to the lien, and seeking a direction that respondent pay to the Sheriff such part of $29,633.24 as is necessary to satisfy petitioners'

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*On June 27th, 1947, Vesting Order 9282 directed Anderson Clayton & Co. to pay to the Custodian the sum of $5101 (R. 24-25). On July 18th, 1947, Anderson Clayton & Co. paid to the Custodian in compliance with Vesting Order 9282 the sum of $5100.59 and, in addition, the sum of $24,532.65 as a voluntary turn-over (R. 25). On November 25, 1947, Vesting Order 10253 was issued by the Custodian covering the amount of $24,532.65 previously turned over to him (R. 25).

judgment with interest and costs (R.16). Respondent moved for judgment on the pleadings and petitioners cross-moved for summary judgment (R. 21-22). The District Court denied respondent's motion and granted petitioners' motion on the authority of *Zittman* v. *McGrath*, 341 U. S. 446 (R. 45).

The Court of Appeals reversed. The Court agreed that petitioners could maintain a Section 9(a) suit if they had an "interest, right or title" in property held by the Custodian, but concluded that an unlicensed attachment conferred no such "interest, right or title". It held, therefore, that the attachment creditor is not entitled to preferential treatment in the distribution of the vested attached assets by the Custodian (R. 50-52). The reasoning of the Court of Appeals was that Section 34 of the Act contemplates "the idea of equality" in the distribution of assets held by the Custodian, that Congress gave authority to the Treasury to nullify attachment liens obtained after the freezing order, and that Treasury Ruling No. 12 was an exercise of that authority (R. 51-52).

Summary of Argument

This Court in the *Zittman* cases held that post-freezing attachments pursuant to state law could create valid liens despite the absence of a license under Executive Order 8389. It held further that General Ruling No. 12 did not in itself invalidate such liens.

This Court did not leave open the broad question of lien validity vis-a-vis the Custodian, as a lien valid against the debtor must be good against the world if it is to be effective. The question left open in the *Zittman* cases was under what circumstances, involving federal questions of administration or distribution, the Custodian might put in issue the enforceability of a valid lien.

Section 34 does not empower the Custodian, in the absence of such a federal question, to refuse recognition to

petitioners' lien, and thus to reduce petitioners to the status of general creditors in the distribution of vested assets.

In this case, the Custodian did not raise any federal question involving the administration of the vested assets. The District Court, therefore, properly held that the attachment lien constituted an interest, right or title in property under Section 9(a) of the Act and that petitioners were entitled to enforcement of their lien as provided in Section 9(a), and, therefore, to an order directing the entry of summary judgment in their favor.

Argument

The conflict between petitioners and respondent is essentially simple. No question of possession or control of vested assets is involved. The issue is whether Congress could or did give the Custodian the power of an extraordinary court in bankruptcy to be exercised without the safeguard of judicial review in the distribution of vested assets.

The Court of Appeals held that the Custodian could reject petitioners' attachment lien although the record shows that in other cases such liens have been accorded a preferred status.*

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* Paragraph 25 of the complaint alleges that: "* * * the Office of Alien Property and its predecessor, the Alien Property Custodian (R. 17), have caused or permitted payment to be made from assets of alien enemies to attachment creditors within the United States without the necessity of a license by the Treasury Department prior to attachment * *.*" Respondent did not deny that allegation. Indeed, by failing to deny it, and moving for summary judgment, he may be deemed to have admitted the truth of the allegation. Interrogatories submitted by petitioners, the answers to which would have shed light on the practice of the Custodian in these cases, were not answered because of the granting of petitioners' motion for summary judgment (R. 26-28). Respondent appears to have permitted such a payment to be made in *Murray Oil Products* v. *Mitsui & Co. Ltd.*, 55 Fed. Supp. 353, aff'd 146 Fed. (2d) 381.

We believe that the Court of Appeals erred in its conclusion and in the steps by which it reached that conclusion. We show in this brief that the decision below is inconsistent with the teaching of the *Zittman* cases. Even if the effect of these decisions as to the validity of the attachment lien be passed for the purpose of the argument, we show that Congress did not, by Section 34 of the Act, give the Custodian power to deprive such lien of priority in the distribution of vested assets, and that Treasury Ruling No. 12 did not have the effect of invalidating such liens.

I.

The state law attachment created a valid lien which is an interest, right or title sufficient to support a Section 9(a) suit.

A. The validity of the lien is established by the *Zittman* decisions.

(1) Analysis of the *Zittman* decisions.

In *Zittman No. 1* this Court, reversing the Court of Appeals for the Second Circuit held that attachment levies were not "'transfers" forbidden by Executive Order 8389, and that the Custodian was not entitled to a declaratory judgment that the attachment creditor "obtained no lien or other interest" in the attached property. The Custodian has issued a "right, title and interest" vesting order. This Court said that "the attachments and the judgments they secured are valid under New York law, and cannot be cancelled or annulled under a 'vesting order' by which the Custodian takes over only the right, title and interest of those debtors in the accounts * * *" (341 U. S. at 464). This Court, therefore, concluded that the attachment creditor was entitled to possession of the res.

In *Zittman No. 2* this Court held that as between an attachment creditor and the Custodian, under a res vesting order, the Custodian was entitled to possession of the property upon which the levy of attachment had been made, noting, however, that "the transfer of possession of these funds does not purport to work any automatic deprivation of rights of any class of creditors, but takes over the estate for administration" (341 U. S. at 474).

The question left open was stated as follows in *Zittman* No. 1:

> "In such case, all federal questions as to recognition by the Custodian of the state law lien, or priority of payment, are reserved for decision if and when presented in accordance with the Act" (341 U. S. at 464).

(2) The Court of Appeals erred in its interpretation of the *Zittman* decisions.

The Court of Appeals premised its decision upon the view that no valid attachment lien could be secured in the absence of a Treasury license, putting the question as follows:

> "Does a lien procured in an 'unlicensed' attachment suit give rise to a lien acquired 'lawfully' as against the Custodian when he makes a res vesting order?" (R. 52).

The Court answered this question in the negative on the ground that Treasury Ruling No. 12 "provided that any unlicensed transfer of property in a blocked account after the effective date of the Executive Order was null and void" and that an attachment was within the scope of the term "transfer" (R. 52). The conclusion that an unlicensed attachment is "null and void" is in irreconcilable conflict with the *Zittman* rationale that an attach-

ment though unlicensed is nevertheless "valid". The Court of Appeals seemed to feel that this Court in the *Zittman* cases, although deciding that an attachment lien was valid as between the parties, had left open the validity of such lien as against the Custodian. This is a much broader question than appears to have been left undecided. If a New York State attachment is "valid" it creates a lien, the settled effect of which under New York law is to give the lienor an interest in the property superior to claims of general creditors.*

"Validity" is not a fissionable concept. An attachment valid as against the debtor should be valid as against the world, and the destruction of priority is a negation of validity.

The language used by this Court in the opinion in *Zittman* No. 1 indicates that the narrow question left open is whether federal questions which may arise in the administration or distribution of the vested attached assets might supersede the right of the attachment creditor to priority in the distribution of the assets. Such questions might, for example, deal with controversies among

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* Chief Justice Cardozo noted the nature of the property interest created by an attachment lien in *Matter of People (First Russian Ins. Co.)*, 253 N. Y. 365:

> "* * * The claimant, the attaching creditor, is not asserting a claim to participate in the fund as a beneficiary of a trust, a member of the class or group for whom administration was assumed. The claim which it asserts is not in subordination to the trust, but in priority and even, in a sense, in hostility thereto. The lien of its attachment has put it in the same position as if it were the holder of a mortgage or of an equitable lien, the product of agreement. A receiver or other officer taking such a fund into his custody, must take it as he finds it, with all its imperfections on its head. One of those imperfections for this receivership was a lien created as security, not for principal alone, but for principal and interest. The fund is not free until the lien has been discharged." (p. 368).

lien claimants, questions of relative priorities of liens, the time of payment and other like problems. Obviously, the mere fact of distribution of the vested assets is not in itself a Federal question.

It is plain that the Court below did not thus interpret the *Zittman* decisions. It held broadly that the Custodian may deny recognition to a valid attachment lien without assigning any reason for his action. But an arbitrary exercise by the Custodian of an asserted power does not in itself involve a federal question warranting non-recognition of the lien.

We show below (*infra*, pp. 22, 23) that the Custodian has not established that there is in this case any federal question the answer to which would require the reduction of an attachment lien or to the status of general creditor. In the absence of such a question the decision below is inconsistent with the *Zittman* decisions.

B. An unlicensed attachment lien gives rise to a Section 9(a) title claim.

Section 9(a) (Appendix, p. 25) provides in part that "Any person not an enemy or ally of enemy claiming any interest, right or title in any money or other property * * * may file with the said custodian a notice of his claim under oath * * *. * * * said claimant may institute suit in equity * * * to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian * * *."

The words "interest, right or title" are of the broadest import and have been so construed. Only this year in

Kaufman v. *Societe Internationale etc.*, 343 U. S. 156, 72 S. Ct. 611,

this Court held that Section 9(a) is available to non-enemy stockholders of a corporation organized under the laws

of a neutral nation, even though it has been found that the corporation is enemy dominated. If the inchoate and indirect interest of a stockholder in corporate assets is sufficient to satisfy the requirement of an "interest, right or title", it would seem to follow clearly enough that a valid attachment lien, even though unlicensed, is an interest sufficient to support a Section 9(a) suit.

II.

The Custodian may not deny recognition to such a lien in distributing vested assets.

A. Section 34 does not require equality among claimants, as construed by the Court of Appeals.

We have shown above that by denying recognition to petitioners' attachment lien the Court of Appeals, contrary to the teaching of the *Zittman* decisions, has in effect denied the validity of that lien. But even passing the holding of the *Zittman* cases on this point, we submit that the Court of Appeals' holding was based upon a construction of Section 34 of the Act that is demonstrably erroneous.

The attempt to justify this result on the theory that Section 34 required "equality" among creditors is untenable. The history of Section 34 demonstrates this fact.

Section 34 was embodied in a bill to amend the First War Powers Act of 1941, the purpose of which was explained in House Report No. 2398, 79th Congress, Second Session. Section 34 (which was numbered 35 in the bill) was intended "to provide machinery for paying claims of creditors against the former owners of vested properties on an equitable basis to the extent that the assets vested from each debtor permit" (House Report No. 2398 at p. 1).

Section 35 of the bill (Sec. 34 of the Act) was at least in part the result of the decision of this Court in *Markham*

v. *Cabell*, 326 U. S. 404, which held that an ordinary creditor of an enemy alien had the right to sue the Custodian under Section 9(a) and to be paid on a "first come, first served" basis (House Report, No. 2398, at pp. 9-10).

The Committee disclaimed any intention to change the status of a secured creditor or a creditor claiming a lien, saying:

> "Protection of a secured creditor or a creditor claiming a lien is afforded by the proviso in subsection (i). Such a claimant may proceed as a general creditor, without thereby waiving his security. In addition or alternatively, he may file a claim or suit as a title claimant for return of his security interest in the property or for just compensation in respect of that interest, in which event his recovery would be reduced, as in the case of any other such plaintiff, to the extent of any debt claim payment made to him (or to any other claimant, if his claim as a title claimant was not filed in time to hold up debt claim payments). It is believed that this arrangement is preferable to provision of a separate special procedure for secured creditors" (House Report No. 2398, at p. 15).

The language of the section itself refutes the conclusion of the Court of Appeals that the principle of "equitable distribution" was intended to reduce lien creditors to the status of debt claimants. Section 34 (i) provides that "the sole relief and remedy available to any person seeking satisfaction of a debt claim * * *" shall be that provided in Section 34; but this is limited by the proviso "that no person asserting any interest, right, or title in any property or interest or proceeds acquired by the Alien Property Custodian, shall be barred from proceeding pursuant to this Act for the return thereof, by reason of any proceeding which he may have brought pursuant to this section; nor

shall any security interest asserted by the creditor in any such property or interest or proceeds be deemed to have been waived solely by reason of such proceeding."

This is a plain recognition that the remedies provided by Section 9(a) of the Act remain unimpaired. An attachment creditor thus is one of the class of creditors whose rights under Section 9(a) are expressly preserved.

Judge Frank, in his opinion below, said: "The absence of any provision according priority to attachment liens indicates an intention to deprive them of any preferential position". We submit to the contrary, that the absence of any provision in Section 34 indicating an intention that attachment liens should be deprived of the status theretofore enjoyed under Section 9(a) demonstrates that Congress did not intend to reduce the attachment creditor to the status of an unsecured creditor. This Court said in *Markham* v. *Cabell,* 326 U. S. 404, at 411:

> "We can find no indication in the 1941 legislation that Congress by amending Section 5(b) desired to delete or wholly nullify Section 9(a). On the contrary, the normal assumption is that where Congress amends only one section of a law, leaving another untouched, the two were designed to function as parts of an integrated whole."

The desire of Congress to preserve the rights theretofore existing under Section 9(a) is affirmatively expressed in the following statement in Senate Report No. 1839, 79th Congress, Second Session, at page 2:

> "The bill as thus amended preserves in full these rights under Section 9(a) which the friendly foreign national, together with the United States citizen has had for more than 25 years under the act."

The decision below has engrafted a limitation upon Section 9(a) which is not justified by the wording of Sec-

tion 34 or by the express policy of Congress which led to the enactment of that Section.

In its decision, the Court of Appeals referred to the conclusions reached by Justices Reed and Burton in *Zittman No. 1* (R. 52). These views were not directed to the question now under consideration. Moreover, it may be observed that these views were expressed in a dissenting opinion. In contrast, there should be noted the concurring opinion of Mr. Justice Douglas, in which he said:

> "But the policy of the Act is in no way subverted by recognition of a lien which can ripen into a priority only if payment would have no such effect. Denial of the lien could be made only if the Act called for an equality of distribution among claimants, regardless of their innocence or guilt. I can find nothing in the Act which warrants leveling the good faith lien claimant to the unsecured status of the others" (341 U. S. 442, at 465).

In a footnote, Mr. Justice Douglas calls attention to the fact that.

> "The priority of debt claims contained in Section 34(g), 60 Stat. 925, 928, does not purport to deal with creditors preferred by reason of a lien lawfully acquired in judicial proceedings" (341 U. S. 442, at 465).

It would appear that the Court of Appeals read into the word "equitable" as used in Section 34 a meaning which is not justified by the history of the statute and the context of the language. Judge Frank's view that the words of Section 34 "suggest repugnance to the notion that the race should be to the swift among the creditors" (R. 51) is in direct conflict with the position of Mr. Justice Douglas.

An interesting comment on the *Zittman* cases dealing with the point of priorities among creditors is to be found in the American Journal of Comparative Law (Vol. 1, No. 4, p. 395), where the author says (at p. 400):

> "It is not fanciful to predict that a new priority may be read into 34(g). It seems safe to say that the Supreme Court was convinced that the attaching creditor procured a greater 'interest' than the right to apply for a license. There appears no conceivable 'interest' between the latter and a priority under 34(g). Diligence, not unfair, should still have its reward."

It is submitted that Section 34 does not empower the Custodian to deny recognition to the attachment lien.

B. General Ruling No. 12 does not invalidate an unlicensed attachment lien.

The Court of Appeals' view of General Ruling No. 12 upon which its decision rests, is in irreconcilable conflict with the interpretation of that Ruling adopted by this Court in *Zittman No. 1.* The Court of Appeals reasoned that, although General Ruling No. 12 provided that an unlicensed transfer of property in a blocked account was "null and void", the attachment in the case at bar could be valid as between the parties, but invalid as against the Custodian. General Ruling No. 12 is thus given a meaning which is neither justified by its language nor required by any considerations of policy in the administration of the Custodian's office.

Mr. Justice Jackson in his opinion in *Zittman No. 1* gave careful consideration to the Ruling, pointing out that if the Government's construction of the Ruling were adopted, the result would be "inconsistent and irreconcilable with the contentions made one day after its issuance

by both the Treasury and the Department of Justice to the New York Court of Appeals" (341 U. S. at 453).

The majority opinion quoted extensively from a brief *amicus curiae* dated April 22, 1942, filed by the Treasury and the Department of Justice in the New York Court of Appeals in *Commission for Polish Relief* v. *Banca Nationala a Rumaniei*, 288 N. Y. 332. We suggest particular note of one sentence quoted from that brief: "So far as foreign funds control is concerned, there can be an attachable interest under New York law with respect to the blocked assets" (341 U. S. at 455).

After considering the shift in the Government's position following the decision of this Court in *Propper* v. *Clark*, 337 U. S. 472, this Court concluded as follows:

> "But, as the Government before that decision so unequivocally urged upon the New York Court of Appeals, attachment proceedings as pursued in these cases have no such consequences. Nothing in these state court proceedings have purported to frustrate the purposes of the federal freezing program. On the contrary, the effect of the State's action, like that of the federal, was to freeze these funds, to prevent their withdrawal or transfer to use of the German nationals. There is no suggestion that these attachment proceedings could in any manner benefit the enemy. The sole beneficiaries are American citizens whose liens are not derived from the enemy but are adverse to any enemy interests. And, if no federal freeze orders were in existence, these state proceedings would tie up enemy property and reduce the amount available for enemy disposition. We agree with the Government's assurance to the Court of Appeals in the Polish Relief case that the proceedings, in view of the fact that they do not purport to control the Custodian in the exercise of the federal

licensing power, or in the power to vest the res if he sees fit to do so for administration, are not inconsistent with the freezing program and we think they were not invalidated or considered in Propper v. Clark, supra" (341 U. S. at 462, 3).

This Court thus has held that General Ruling No. 12 properly construed does not require a Treasury license as a condition precedent to a valid attachment under State law. The Treasury and the Department of Justice have said that considerations of administration do not impel the interpretation of General Ruling No. 12 which the Government urged in the *Zittman* cases. If the so-called "unlicensed" attachment is valid, then plaintiff, as a lien creditor, has statutory rights under Section 9(a) which cannot be brushed aside by a factitious distinction that the lien, though valid as between the parties, is invalid against the Custodian.

C. Congress has not given the Custodian the powers of a bankruptcy court.

It is suggested in the opinion of the Court of Appeals that the power to nullify attachment liens has been granted by Congress to the Custodian on the analogy of the nullification of preferences in bankruptcy. There is nothing in the Act to support the view that Congress intended to grant to the Custodian the extraordinary powers of a bankruptcy court. Indeed, it is questionable that Congress could constitutionally do so.

> *Ochoa* v. *Hernandez y Morales*, 230 U. S. 139;
> *Lynch* v. *United States*, 292 U. S. 571.

This aspect of the matter is considered in the article in the American Journal of Comparative Law mentioned above. The author makes the following observations:

"* * * This statutory nullification of liens acquired by aid of the judicial process is perfectly defensible and desirable where an estate is in liquidation and the unfortunate debtor, by discharge, is given a chance to start over again. If that is the context, it may well be equitable to deprive a creditor of lawfully acquired security. But to what extent is this true as regards property vested by the Custodian? The estate is not in liquidation in any technical sense. Even as regards German and Japanese properties, which by section 39 of the Act are not to be returned to their former owners, the analogy is not persuasive since such debtors are amenable to suit and their other assets, if any, can be reached. As regards other 'enemies' such as the Swiss, the analogy seems even less persuasive. Furthermore payment of claims by the Custodian does not purport to discharge the debtor. Hence it would seem that the claimant who has no such 'interest' as Zittman cannot complain of discrimination. He can still pursue his claim against the debtor." (Am. Jour. of Comparative Law, Vol. I, No. 4, at p. 400.)

D. The recognition of petitioners' attachment lien does not result in discrimination among attachment claimants.

The Court of Appeals suggests that since, in some states, an attachment does not create a lien, the granting of such preferences will result in a lack of uniformity in an area which is peculiarly of national concern.

Where the battle is between claimants to the vested property, the respective rights are not a matter of national concern. Differences in creditors' rights necessarily are inherent in our system of state law. Since the Act places in a separate category as title claimants those who can

show an "interest, right or title" in the vested property, it is necessary that rights and interests created by state law shall be recognized in the determination of title claims.

Attachment lien interests are no different in this respect than mortgage or pledge interests. The fact that creditors in different states may fare differently is no justification for refusing recognition to the respective state laws. The rejection of petitioners' attachment lien on the ground that some other state might not recognize such a lien in similar circumstances means that we permit such other state to make the law for all the states. The reduction of all claimants of this class to the status of general creditors may be equality, but it is not equity.

This Court has frequently refused to bow to the demand for uniformity, in recognition of the fact that our federal system imposes a scrupulous regard for the differences of local law. The mere fact that the problems of war-time control of enemy property have placed such property in the hands of the Government for administration should not lead to the rejection of established concepts in local laws in the determination of those who are entitled to such property, when the Government is about to distribute it.

E. The Custodian's power, as construed by the Court of Appeals, is arbitrary and unlimited.

The Court of Appeals said that General Ruling No. 12 (as interpreted by it) was an appropriate exercise of the licensing power granted to the Custodian by Section 5(b) of the Act. The record shows that two applications for license by petitioners were denied (R. 24, 26). No reasons were given for such action. On the other hand, some unlicensed attachments have been favored by the Custodian (R. 17). We are informed, for example, that the Custodian granted a license and paid the amount of the attachment lien sustained in

Murray Oil Products v. *Mitsui & Co. Ltd.*, 55 Fed. Supp. 353, affd 146 Fed. (2d) 381.

The power given to the Custodian is thus arbitrary and unlimited. In the absence of criteria for the guidance of an administrative official in the exercise of a delegated licensing power, the very grant of power may be subject to challenge.

See, *e.g.*,

Panama Refining Co. et al. v. *Ryan*, 293 U. S. 388;
Morgan et al. v. *United States, et al.*, 304 U. S. 1.

The position taken by the Court of Appeals goes far beyond the needs of policy behind Section 5(b). An interpretation of the Act which avoids this issue is called for. If General Ruling No. 12 is limited as indicated in the opinion in *Zittman No. 1*, the question of the extent of the Custodian's discretion in the exercise of the licensing power may be put aside for decision in an appropriate case.

F. The decision of the Court of Appeals presents a constitutional question.

The Fifth Amendment to the Constitution of the United States denies to Congress power to transfer property from one to another directly or indirectly. The right to retain a lien until the debt secured thereby is paid is a substantive property right.

Such property may be taken by the Government under its war powers without compensation. That, however, is not the problem here. The refusal to recognize petitioners' attachment lien enures to the benefit of general creditors. In effect, it enhances the share which general creditors will receive, at the expense of petitioners.

It is unnecessary to push the constitutional question thus presented as it is apparent that a construction of the statute which will result in recognition of petitioners' lien will avoid such problems.

III.

The Custodian raised no federal question in this case to justify the denial of enforcement of petitioners' lien.

A. No question of administration has been raised.

In the District Court, respondent moved for judgment on the pleadings and petitioners made a cross-motion for summary judgment. An affidavit was submitted in support of the cross-motion for summary judgment (R. 22-28). No affidavit was submitted in opposition to that motion. The record shows that a letter was submitted by the Department of Justice to the District Judge on the settlement of the order granting the motion for summary judgment (R. 34-37). The correspondence related solely to the form of the order and the inclusion therein of a provision for payment of the Sheriff's poundage fees.

There has been no claim made by the Custodian that the relief sought by petitioners would in any way interfere with the orderly administration of the vested assets. There has been no conflict of lien claims or other federal question raised by the Custodian in opposition to petitioners' suit. Without attempting to limit the scope of the federal questions which might justify the Custodian in contesting a Section 9(a) suit, we believe that nothing in the record in this case can justify such action. Therefore, under Section 9(a) petitioners were entitled to an order directing the Custodian to pay their claim.

B. The decision of the Court of Appeals results in a real loss to petitioners.

The brief filed by respondent in opposition to the petition for a writ of certiorari showed that the vested assets of Sanko aggregate $36,236.02. Claims filed aggregate $192,371.38.

Unless petitioners' attachment lien is accorded a Section 9(a) status, petitioners will be reduced to the level of general creditors. On the figures given above, petitioners would thus receive not more than 19% of the amount of their claim. Their loss, therefore, will be not less than $16,000.

C. The Custodian has not brought himself within the area of the question left open in the *Zittman* cases.

This Court indicated in the *Zittman* cases that there might be situations in which the Custodian could contest the enforcement of a valid attachment lien through a Section 9(a) suit. No catalogue of such cases need be made for the purposes of this litigation. The Court of Appeals took the dictum of *Zittman* to mean that the Custodian may not only contest the lien when a federal question justifies such action, but may arbitrarily reject it without cause. We submit that this Court indicated just the opposite of that rule. There having been no justifying ground for opposition by the Custodian, petitioners' lien was entitled to enforcement as prescribed by the District Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court below should be reversed and that of the District Court reinstated.

Dated: January 12, 1953.

DONALD MARKS,
Counsel for Petitioners.

APPENDIX

1. Trading with the Enemy Act, c. 106, 40 Stat. 411, as amended, 50 U. S. C. App. 1, et seq.:

* * * * *

Sec. 5, as amended by the First War Powers Act of 1941, c. 593, Sec. 301, 55 Stat. 839, 50 U. S. C. App. 5;

(b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person, as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property, shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or per-

son may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * * and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

* * *

§ 9. (a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy, whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided,* That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it

has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

* * *

SEC. 34(a) Any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, shall be equitably applied by the Custodian in accordance with the provisions of this section to the payment of debts owed by the person who owned such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian. No debt claim shall be allowed under this section if it was not due and owing at the time of such vesting or transfer, or if it arose from any action or transactions prohibited by or pursuant to this Act and not licensed or otherwise authorized pursuant thereto, or (except in the case of debt claims acquired by the Custodian) if it was at the time of such vesting or transfer due and owing to any

person who has since the beginning of the war been convicted of violation of this Act, as amended, sections 1-6 of the Criminal Code (18 U. S. C. 1-6), title I of the Act of June 15, 1917 (ch. 30, 40 Stat. 217), as amended; the Act of April 20, 1918 (ch. 59, 40 Stat. 534), as amended; the Act of June 8, 1934 (ch. 327, 52 Stat. 631), as amended; the Act of January 12, 1938 (ch. 2, 52 Stat. 3); title I, Alien Registration Act, 1940 (ch. 439, 54 Stat. 670); the Act of October 17, 1940 (ch. 897, 54 Stat. 1201); or the Act of June 25, 1942 (ch. 447, 56 Stat. 390). Any defense to the payment of such claims which would have been available to the debtor shall be available to the Custodian, except that the period from and after the beginning of the war shall not be included for the purpose of determining the application of any statute of limitations. Debt claims allowable hereunder shall include only those of citizens of the United States or of the Philippine Islands; those of corporations organized under the laws of the United States or any State, Territory, or possession thereof, or the District of Columbia or the Philippine Islands; those of other natural persons who are and have been since the beginning of the war residents of the United States and who have not during the war been interned or paroled pursuant to the Alien Enemy Act (50 U. S. C. 21); and those acquired by the Custodian. Legal representatives (whether or not appointed by a court in the United States) or successors in interest by inheritance, devise, bequest, or operation of law of debt claimants, other than persons who would themselves be disqualified hereunder from allowance of a debt claim, shall be eligible for payment to the same extent as their principals or predecessors would have been.

(b) The Custodian shall fix a date or dates after which the filing of debt claims in respect of any or all debtors shall be barred, and may extend the time so fixed, and shall give at least sixty days' notice thereof by publication in the Federal Register. In no event shall the time extend beyond the expiration of two years from the date of the last vesting

in or transfer to the Custodian of any property or interest of a debtor in respect of whose debts the date is fixed, or from the date of enactment of this section, whichever is later. No debt shall be paid prior to the expiration of one hundred and twenty days after publication of the first such notice in respect of the debtor, nor in any event shall any payment of a debt claim be made out of any property or interest or proceeds in respect of which a suit or proceeding pursuant to this Act for return is pending and was instituted prior to the expiration of such one hundred and twenty days.

(c) The custodian shall examine the claims, and such evidence in respect thereof as may be presented to him or as he may introduce into the record, and shall make a determination, with respect to each claim, of allowance or disallowance, in whole or in part.

(d) Payment of debt claims shall be made only out of such money included in, or received as net proceeds from the sale, use, or other disposition of, any property or interest owned by the debtor immediately prior to its vesting in or transfer to the Alien Property Custodian, as shall remain after deduction of (1) the amount of the expenses of the Office of Alien Property Custodian (including both expenses in connection with such property or interest or proceeds thereof, and such portion as the Custodian shall fix of the other expenses of the Office of Alien Property Custodian), and of taxes, as defined in section 36 hereof, paid by the Custodian in respect of such property or interest or proceeds, and (2) such amount, if any, as the Custodian may establish as a cash reserve for the future payment of such expenses and taxes. If the money available hereunder for the payment of debt claims against the debtor is insufficient for the satisfaction of all claims allowed by the Custodian, ratable payments shall be made in accordance with subsection (g) hereof to the extent permitted by the money

available and additional payments shall be made whenever the Custodian shall determine that substantial further money has become available, through liquidation of any such property or interest or otherwise. The Custodian shall not be required through any judgment of any court, levy of execution, or otherwise to sell or liquidate any property or interest vested in or transferred to him, for the purpose of paying or satisfying any debt claim.

(e) If the aggregate of debt claims filed as prescribed does not exceed the money from which, in accordance with subsection (d) hereof, payment may be made, the Custodian shall pay each claim to the extent allowed, and shall serve by registered mail, on each claimant whose claim is disallowed in whole or in part, a notice of such disallowance. Within sixty days after the date of mailing of the Custodian's determination, any debt claimant whose claim has been disallowed in whole or in part may file in the District Court of the United States for the District of Columbia a complaint for review of such disallowance naming the Custodian as defendant. Such complaint shall be served on the Custodian. The Custodian, within forty-five days after service on him, shall certify and file in said court a transcript of the record of proceedings in the Office of Alien Property Custodian with respect to the claim in question. Upon good cause shown such time may be extended by the court. Such record shall include the claim as filed, such evidence with respect thereto as may have been presented to the Custodian or introduced into the record by him, and the determination of the Custodian with respect thereto, including any findings made by him. The court may, in its discretion, take additional evidence, upon a showing that such evidence was offered to and excluded by the Custodian, or could not reasonably have been adduced before him or was not available to him. The court shall enter judgment affirming, modifying, or reversing the Custodian's determination, and directing payment in the amount, if any, which it finds due.

(f) If the aggregate of debt claims filed as prescribed exceeds the money from which, in accordance with subsection (d) hereof, payment may be made, the Custodian shall prepare and serve by registered mail on all claimants a schedule of all debt claims allowed and the proposed payment to each claimant. In preparing such schedule, the Custodian shall assign priorities in accordance with the provisions of subsection (g) hereof. Within sixty days after the date of mailing of such schedule, any claimant considering himself aggrieved may file in the District Court of the United States for the District of Columbia a complaint for review of such schedule, naming the Custodian as defendant. A copy of such complaint shall be served upon the Custodian and on each claimant named in the schedule. The Custodian, within forty-five days after service on him, shall certify and file in said court a transcript of the record of proceedings in the Office of Alien Property Custodian with respect to such schedule. Upon good cause shown such time may be extended by the court. Such record shall include the claims in question as filed, such evidence with respect thereto as may have been presented to the Custodian or introduced into the record by him, any findings or other determinations made by the Custodian with respect thereto, and the schedule prepared by the Custodian. The court may, in its discretion, take additional evidence, upon a showing that such evidence was offered to and excluded by the Custodian, or could not reasonably have been adduced before him or was not available to him. Any interested debt claimant who has filed a claim with the Custodian pursuant to this section, upon timely application to the court, shall be permitted to intervene in such review proceedings. The court shall enter judgment affirming or modifying the schedule as prepared by the Custodian and directing payment, if any be found due, pursuant to the schedule as affirmed or modified and to the extent of the money from which, in accordance with subsection (d) hereof, payment may be made. Pending the decision of

the court on such complaint for review, and pending final determination of any appeal from such decision, payment may be made only to an extent, if any, consistent with the contentions of all claimants for review.

(g) Debt claims shall be paid in the following order of priority: (1) Wage and salary claims, not to exceed $600; (2) claims entitled to priority under sections 191 and 193 of title 31 of the United States Code, except as provided in subsection (h) hereof; (3) all other claims for services rendered, for expenses incurred in connection with such services, for rent, for goods and materials delivered to the debtor, and for payments made to the debtor for goods or services not received by the claimant; (4) all other debt claims. No payment shall be made to claimants within a subordinate class unless the money from which, in accordance with subsection (d) hereof payment may be made permits payments in full of all allowed claims in every prior class.

(h) No debt of any kind shall be entitled to priority under any law of the United States or any State, Territory, or possession thereof, or the District of Columbia, solely by reason of becoming a debt due or owing to the United States as a result of its acquisition by the Alien Property Custodian.

(i) The sole relief and remedy available to any person seeking satisfaction of a debt claim out of any property or interest which shall have been vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the proceeds thereof, shall be the relief and remedy provided in this section, and suits for the satisfaction of debt claims shall not be instituted, prosecuted, or further maintained except in conformity with this section: *Provided*, That no person asserting any interest, right, or title in any property or interest or proceeds acquired by the

Alien Property Custodian, shall be barred from proceeding pursuant to this Act for the return thereof, by reason of any proceeding which he may have brought pursuant to this section; nor shall any security interest asserted by the creditor in any such property or interest or proceeds be deemed to have been waived solely by reason of such proceeding. The Alien Property Custodian shall treat all debt claims now filed with him as claims filed pursuant to this section. Nothing contained in this section shall bar any person from the prosecution of any suit at law or in equity against the original debtor or against any other person who may be liable for the payment of any debt for which a claim might have been filed hereunder. No purchaser, lessee, licensee, or other transferee of any property or interest from the Alien Property Custodian shall, solely by reason of such purchase, lease, license, or transfer, become liable for the payment of any debt owed by the person who owned such property or interest prior to its vesting in or transfer to the Alien Property Custodian. Payment by the Alien Property Custodian to any debt claimant shall constitute, to the extent of payment, a discharge of the indebtedness represented by the claim.

* * *

2. Executive Order No. 8389, April 10, 1940, 5 F. R. 1400, as amended by Executive Order 8785, June 14, 1941, 6 F. R. 2897;

By virtue of and pursuant to the authority vested in me by Section 5 (b) of the Act of October 6, 1917 (40 Stat. 415), as amended, by virtue of all other authority vested in me, and by virtue of the existence of a period of unlimited national emergency, and finding that this Order is in the public interest and is necessary in the interest of national defense and security, I, FRANKLIN D. ROOSEVELT, PRESIDENT OF THE UNITED STATES OF AMERICA, do prescribe the following:

SEC. 1. All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury, by means of regulations, rulings, instructions, licenses, or otherwise, if (i) such transactions are by, or on behalf of, or pursuant to, the direction of any foreign country designated in this Order, or any national thereof, or (ii) such transactions involve property in which any foreign country designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature whatsoever, direct or indirect:

A. All transfers of credit between any banking institutions within the United States; and all transfers of credit between any banking institution within the United States and any banking institution outside the United States (including any principal, agent, home office, branch, or correspondent, outside the United States, of a banking institution within the United States);

B. All payments by or to any banking institution within the United States;

C. All transactions in foreign exchange by any person within the United States;

D. The export or withdrawal from the United States, or the earmarking of gold or silver coins or bullion or currency, by any person within the United States;

E. All transfers, withdrawals, or exportations of, or dealings in, any evidence of indebtedness or evidences of ownership of property by any person within the United States; and

F. Any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions.

* * *

3. General Ruling No. 12, April 21, 1942, 7 F. R. 2991:

SEC. 131.12

(a) Unless licensed or otherwise authorized by the Secretary of the Treasury, (1) any transfer after the effective date of [Executive Order No. 8389, see General Ruling No. 4, par. (1), *supra*] is null and void to the extent that it is (or was) a transfer of any property in a blocked account at the time of such transfer; and (2) no transfer after the effective date of the Order shall be the basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or interest in, any property while in a blocked account (irrespective of whether such property was in a blocked account at the time of such transfer).

(b) Unless licensed or otherwise authorized by the Secretary of the Treasury, no transfer before the effective date of the Order shall be the basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or interest in, any property while in a blocked account unless the person with whom such blocked account is held or maintained had written notice of the transfer or by any written evidence had recognized such transfer prior to the effective date of the Order.

(c) Unless otherwise provided, an appropriate license or other authorization issued by the Secretary of the Treasury before, during, or after a transfer shall validate such transfer or render it enforceable to the same extent as it would be valid or enforceable but for the provisions of section 5(b) of the Trading with the Enemy Act, as amended, and Order, regulations, instructions and rulings issued thereunder.

(d) Any transfer affected by the Order and/or this general ruling, and involved in, or arising out of, any action or proceeding in any Court within the United States shall, so far as affected by the Order and/or this general ruling, be valid and enforceable for the purpose of determining

for the parties to the action or proceeding the rights and liabilities therein litigated: *Provided however,* That no attachment, judgment, decree, lien, execution, garnishment, or other judicial process shall confer or create a greater right, power or privilege with respect to, or interest in, any property in a blocked account than the owner of such property could create or confer by voluntary act prior to the issuance of an appropriate license.

(e) For the purposes of this general ruling:

(1) The term "transfer" shall mean any actual or purported act or transaction, whether or not evidenced by writing, and whether or not done or performed within the United States, the purpose, intent, or effect of which is to create, surrender, release, transfer, or alter, directly or indirectly, any right, remedy, power, privilege, or interest with respect to any property and without limitation upon the foregoing shall include the making, execution, or delivery of any assignment, power, conveyance, check, declaration, deed, deed of trust, power of attorney, power of appointment, bill of sale, mortgage, receipt, agreement, contract, certificate, gift, sale, affidavit, or statement; the appointment of any agent, trustee, or other fiduciary; the creation or transfer of any lien; the issuance, docketing, filing, or the levy of or under any judgment, decree, attachment, execution, or other judicial or administrative process or order, or the service of any garnishment; the acquisition of any interest of any nature whatsoever by reason of a judgment or decree of any foreign country; the fulfillment of any condition, or the exercise of any power of appointment, power of attorney, or other power: *Provided, however,* That the term "transfer" shall not be deemed to include transfers by operation of law.

(2) The term "property" includes gold, silver, bullion, currency, coin, credit, securities (as that term is defined in section 2(1) of the Securities Act of 1933, as amended), bills

of exchange, notes, drafts, acceptances, checks, letters of credit, book credits, debts, claims, contracts, negotiable documents of title, mortgages, liens, annuities, insurance policies, options and futures in commodities, and evidences of any of the foregoing. The term "property" shall not, except to the extent indicated, be deemed to include chattels or real property.

* * *